only one English translation which could properly be looked at and construed by the court.

It is the duty of counsel who wish to submit that the meaning of words in a foreign language is ambiguous or that a translation is incorrect to call expert evidence on the point. In the absence of such expert evidence in this case, it was, in my opinion, not open to the learned judge to decide that the French text of the Convention is ambiguous.

Article 8(i) of the Convention as set out in the First Schedule to the Carriage by Air Act, 1932 provides that the air consignment note shall contain particulars of the weight, the quantity and the volume or dimensions of the goods. In the present case, as only the weight of the goods was stated in the air consignment note, it is clear that the air consignment note did not contain all the required particulars. It follows therefore that the defendants were not entitled to avail themselves of the provisions of the Convention which exclude or limit their liability.

In view of the foregoing the appeal is allowed with costs here and below. There will be judgment for the first plaintiffs for the sum of $53,142.97.

Wee Chong Jin C.J. (Singapore) and Chua J. concurred.

Appeal allowed.

Solicitors: *Allen & Gledhill; Drew & Napier.*

YEE HUP TRANSPORT & CO. & ANOR. v. WONG KONG

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and Ong Hock Thye F.J.) May 3, 1967]

[Penang — Federal Court Civil Appeal No. X48 of 1966]

Damages — Personal injuries — Quarry contractor — Pecuniary loss — Assessment of — Loss of earning past and future — Quantum of damages.

Leg — ½" shortening of left leg — Limitation of flexion of knee.

This was an appeal on quantum of damages. The respondent, having been injured in a road accident, succeeded in obtaining an award of damages amounting to $26,916 in the High Court at Ipoh ([1966] 2 M.L.J. 234). The appellants' contention was that this award was excessive and based on erroneous principles.

The above sum was made up of: (a) 3 items of out-of-pocket expenses totalling $916; (b) loss of earnings for 42 months, from date of injury to trial of the action $8,400; (c) loss of prospective earnings $12,600; (d) damages for pain and suffering $5,000. No complaint was made against the items of special damage amounting to $916.

The respondent claimed that, until the temporary disablement, he was a quarry contractor, earning $300 per month. On the evidence the learned judge placed him in the category of a foreman who merely supervised the breaking of stones and their despatch to customers' work sites. He assessed the respondent's true monthly income at $200. It was also in evidence that the respondent was in fact physically disabled from pursuing his normal occupation for eleven months.

Held: (1) the general damages should not be awarded as though they were special damages properly pleaded and proved;

(2) taking into account the claimant's disablement, reduction of earning capacity, pain and suffering and loss of amenities the award will be reduced for actual loss of earnings from $8,400 to $2,000 and in lieu of the general damages, which came to a total of $17,600, the award will be reduced to the sum of $8,800.

Cases referred to:—

(1) *Ilkiw* v. *Samuels* [1963] 1 W.L.R. 991, applied.

(2) *The Wagon Mound* [1961] A.C. 388.

FEDERAL COURT.

R. Talalla for the appellants.

E. K. Yeap for the respondent.

Cur. Adv. Vult.

Ong Hock Thye F.J.: This is an appeal on quantum of damages. The respondent, having been injured in a road accident, succeeded in obtaining an award of damages amounting to $26,916 in the High Court at Ipoh. The appellant's contention is that this award is excessive and based on erroneous principles.

The above sum is made up of (a) 3 items of out-of-pocket expenses totalling $916; (b) loss of earnings for 42 months, from date of injury to trial of the action $8,400; (c) loss of prospective earnings $12,600; (d) damages for pain and suffering $5,000. No complaint is made against the items of special damage amounting to $916.

The respondent claimed that, until his temporary disablement, he was a quarry contractor, earning $300 per month. On the evidence the learned judge placed him in the category of a foreman who merely supervised the breaking of stones and their despatch to customers' work sites. He assessed the respondent's true monthly income at $200 which I think was realistic. The volume of his business was so inconsiderable that it was not worth while for him to keep any accounts or wages book. He was also dependent partially on his wife's small earnings as an odd job labourer bringing home about $80 per month. After his accident it was alleged that their 14 year-old son and 12 year-old daughter were compelled to leave school and seek employment in order to make up for the loss of the family bread-winner's income.

The respondent was 59 years-old when the trial took place; hence he was approximately 55 when he suffered the injury on September 5, 1962 He was on his back for 168 days in hospital while a compound fracture of the upper third of the left femur was mending. On the evidence his incapacity lasted 11 months altogether. Examination by the State Surgeon, Perak, in April 1964 revealed a slight limp by reason of a ½-inch shortening of the left leg and limitation

of flexion of the knee to about a right-angle. This was the sum total of the permanent effects of his injuries.

His occupational activities lay principally in supervising labourers breaking stones — not in performing such arduous toil himself. The slight limp, due to the ½-inch shortening of one leg could hardly have been serious, from any point of view. But being unable to sit on his haunches, in the trial judge's view, was "the more serious, as far as loss of amenity is concerned", since "he would not be able to ride a bicycle or use the Asian type of lavatory"; moreover, his was the type of work that could not be performed "from an arm-chair and would involve a certain measure of physical strain." With respect, it seems to me that, even for a person without any disability, just standing up for long periods "involves a certain amount of physical strain." So also does the work of the police constable on beat duty or any kind of physical labour. The real question was whether he was in any way less capable of going about his normal occupation. If so, then and then only, would arise the assessment of the pecuniary loss resulting therefrom. Loss of earning capacity is a horse of a different colour from loss of amenity.

I shall now deal at the same time with the two heads of loss of earnings, past and future, for which the respective awards were $8,400 and $12,600, a total of $21,000. I am indebted to Mr. Talalla for calling my attention to *Ilkiw* v. *Samuels*.[1] There the plaintiff claimed special damage of £77 based on loss of wages for four months after the accident, but at the trial, which did not take place till after 8 years, a continuing loss of wages of £200 a year and 446 days' absence from work for hospital treatment was proved. Phillmore J. awarded total damages of £4,077. An excerpt from the judgment, on appeal, of Willmer L.J., at p. 1001, which I quote below, should render any explanation by me otiose:—

"If I thought that, in coming to that result, the judge was doing no more than taking into consideration this man's overall loss of earning capacity, past, present and future, as merely one factor to be considered amongst all the other factors in awarding a global sum by way of general damages, I should certainly have hesitated before saying that we ought to interfere with that approach. But the case which has been put forward (and which, I think, succeeds) is that, whatever the judge may have said, he must in effect have allowed substantially the whole of the loss of wages claimed over the past eight years as a quantified sum. What is said is that he has in effect awarded that as though it were special damage which had been properly pleaded. I am driven to the conclusion that the judge must have done something substantially like that, for I find it difficult to see how otherwise he could possibly have arrived at the figure of £4,000, which he awarded by way of general damages. As I have already indicated, this does not strike me as a case in which there is much room for any large sum to be awarded in respect of future loss of earnings, having regard to the age which this plaintiff has already attained. In the circumstances, the very large figure at which the judge arrived must, as it appears to me, either have contained a very substantial (although concealed) element of past loss of earnings, which were never pleaded as special damage, or else the figure awarded is a wholly erroneous estimate of the plaintiff's loss. On either view, this court would be not only justified in interfering, but bound to interfere."

In the instant case the special damage in respect of loss of earnings was pleaded in these terms: "Loss of earning from 5.9.1962 to 16.6.1964 estimated at $300 per month, $6,450". On the evidence, however, the respondent was in fact physically disabled from pursuing his normal occupation for only 11 months. After that period the reason why he could not resume it was thus set out in the judgment of the learned trial judge:—

"The physical disabilities sustained by the plaintiff do not appear to be the reason why he did not resume his business as soon as he recovered from his injuries. The reason was lack of money to meet capital expenditure estimated at $1,500, but the plaintiff qualified that statement by saying that he would have required an assistant to help him."

Taking the respondent's word for it that he would need an assistant to carry on, the judge said:—

"The question of finding the necessary capital would not be a problem if plaintiff recovers damages in this action but the necessity of making allowance for the employment of an assistant would depend upon the extent to which plaintiff is incapacitated from carrying on the business by virtue of his physical disabilities. The main task in his business is supervision over the work of breaking stone at the quarry and delivering them at the work site. It is not exactly the type of work which could be carried out from an armchair and would involved a certain measure of physical strain. In a work of this kind, even if the plaintiff is able to work part-time it may not be possible to engage a part-time assistant. In view of the physical disabilities sustained by the plaintiff, I am of the opinion that the business cannot be efficiently carried on by him without a full-time assistant."

With the utmost respect, the passages I have quoted seem to be self-contradicting. Since it was lack of capital, not physical disability, which was responsible for the unfortunate man's idleness after the eleventh month, I cannot see how the appellants should have to pay for a further 31 months' loss of earnings for which they cannot in law be held responsible. If supervising labourers could not be performed standing, all that the respondent had to do was to buy himself a light rattan chair, which is easily portable, for a few dollars, and he could then have dispensed with an assistant who would require to be paid wages amounting to three-fourths of the respondent's own income. In any event, the theft of his implements (said to cost $500) was not even remotely foreseeable as a consequence of the accident some miles from the quarry: see *The Wagon Mound*.[2] The appellants were clearly not responsible for the respondent's enforced idleness due to lack of tools and working capital.

In *Ilkiw* v. *Samuels* [1] a global figure of £2,000 was awarded for general damages, taking into account the claimant's disablement, reduction of earning capacity, pain and suffering and loss of amenities. I would do likewise in this case.

I acordingly reduce the award for actual loss of earnings from $8,400 to $2,200 and, in lieu of the general damages, which came to a total of $17,600, I would award a reduced sum of $8,800. In the result there will be judgment for the respondent for $11,916: costs of this appeal to the appellant.

Barakbah L.P. and **Azmi C.J. (Malaya)** concurred.

Appeal allowed on issue of quantum of damages.

Solicitors: *Richard Talalla & Co.; Yeap & Yeap.*

ABDULLAH v. PUBLIC PROSECUTOR

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and Ong Hock Thye F.J.) May 17, 1967]

[K.L. — Federal Court Criminal Appeal No. 5 of 1966]

Penal Code s. 302 — Murder — Defence of grave and sudden provocation — Summing-up — Burden of proof — Misdirection.

The appellant was found guilty of murder by a majority verdict of the jury. It was not seriously disputed at the trial that the fatal injury on the neck of the deceased was inflicted by the appellant. There were several grounds of appeal, but the court dealt with only one ground, namely as to the judge's direction on the question of grave and sudden provocation. The learned judge in his summing-up on this defence had said: "however, when an accused person raises defences of the sort now raised, it shows that he wishes to bring himself within the exceptions provided by the law. Then the onus of proof shifts upon him."

Held: it was a misdirection in law to say that the burden is on the appellant to bring himself within the exceptions. Retrial ordered.

Case referred to:—

(1) *Looi Wooi Saik* v. *Public Prosecutor* [1962] M.L.J. 337.

FEDERAL COURT.

C. Thambiah for the appellant.

Ajaib Singh (Deputy Public Prosecutor) for the respondent.

Azmi C.J. (Malaya) (delivering oral judgment): The appellant was found guilty of murder under section 302 of the Penal Code by the jury by a majority verdict of 5 to 2. The learned judge expressed agreement with that verdict.

It was not seriously disputed at the trial that the fatal injury on the neck of the deceased was inflicted by the appellant.

He, however, raised the following defences, namely that if he did strike, the striking was accidental, (2) that if he did strike it was in self defence and (3) that if he did strike the deceased it was due to grave and sudden provocation.

The accused himself at the trial gave evidence on oath and told the court that the deceased challenged him to get down from his house so that he, the deceased, could cut him. At that time according to appellant, the deceased was carrying a parang and just as the appellant got down to the steps, deceased rushed and struck at him, whereupon the appellant dodged sideways and backwards and swung his own parang. He then ran away.

There were several grounds of appeal argued before us this morning, but in our view, it is sufficient if we deal with only one ground, namely as to the judge's direction on the question of provocation. The learned judge in his summing-up as to the defence put up by the appellant said as follows:—

> "However, when an accused person raises defences of the sort now raised, it shows that he wishes to bring himself within exceptions provided by the law. Then the onus of proof shifts upon him."

In our view, it is a misdirection in law to say that the burden is on the appellant to bring himself within the exceptions.

This court in *Looi Wooi Saik* v. *Public Prosecutor* [1] said as follows:—

> "At a later stage, however, when discussing the defence of provocation he said this:—
>
> > 'Now, the defence in this case as put up by counsel is that the accused killed the woman whilst he was deprived of his power of self-control by reason of a sudden and grave provocation, and the question whether there was such provocation is a question of fact for you to consider. I think I had better say it now that when you are considering the defence story you do so only on the balance of probabilities, that is to say, if you think that the defence story is reasonably true, then you must say that he has discharged that burden. The burden is certainly on him on this question of provocation. . .'
>
> In our view this direction was not correct".

Then further down the judgment Thomson C.J. (as he then was) went further on to say (at p. 340) as follows:—

> "In the case of murder where a defence such as provocation is set up there would seem to be a conflict of presumptions. On the one hand there is the presumption of innocence of the offence of murder which arises from section 101; on the other hand there is the presumption of the non-existence of provocation which arises from section 105. . . . In any event the only logical result is that the presumption of innocence must be the stronger. Where there is any reasonable doubt as to whether the accused person has brought himself within the exception of provocation that must in its turn create a doubt as to whether he is guilty of murder and, therefore, a prudent man would not regard that offence as proved against him.
>
> In the circumstances it is our view that the proper direction to a jury is that if the defence of provocation is to succeed there must be something to support it, either something in the prosecution evidence or some evidence